UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 567, AFL-CIO,	)	
PLAINTIFF	)	
v.	)	**CIVIL NO. 95-256-P-H**
BAY ELECTRIC COMPANY, INC.,	)	
DEFENDANT	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The union brings this action under section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. The union seeks to have the court order that the employer comply with an arbitration award issued May 18, 1993, as "clarified" January 6, 1994. In fact, the arbitration award is a model of ambiguity. The original award in its entirety provided: "In the instant case the employer violated Article IV, Section 4.02 and is instructed to make whole the aggrieved employee(s)." Joint Ex. 4. No aggrieved employee or dollar amount was specified. The so-called clarification was abstract boilerplate that added only principles of mitigation. It did not specify the period of time to be covered, who the aggrieved employee(s) was or were, or amounts. See Joint Ex. 10.

Courts should not be expected to enforce such ambiguous arbitration awards. The issues in this case, for example, involve interpreting the contract to determine who was actually aggrieved, for how long, and what the proper amount of wages and fringe benefits are -- issues that ordinarily take their essence from the agreement and should be determined by arbitrators under a collective bargaining agreement. I ask the lawyers for both parties, who are active practitioners in the labor area, to make clear to their clients that in future cases such ambiguous awards will be remanded.

Here, however, both sides wish a final resolution of this dispute without incurring additional fees and delay by returning once again to the arbitration process. I, therefore, treat as waived all arguments that might otherwise justify my deferring this matter to further arbitration.

The trial in this case took place on August 14, 1996. I have reviewed all the exhibits that were admitted, as well as the videotaped deposition and/or transcript of witness Kraft. The following are my findings of fact and conclusions of law:

1. It is undisputed that the employer, Bay Electric Company, Inc., was bound to the terms and conditions of a collective bargaining agreement between Northeast New England Chapter, New England Contractors Association ("NECA"), Portland Division and the International Brotherhood of Electrical Workers, Local Union 567, an agreement that expired by its terms May 31, 1992.

2. It is undisputed that the employer breached the collective bargaining agreement on May 11, 1992, by hiring Robert Lawrence without calling the union for a referral, as the arbitrators found. The only issue is what amounts, if any, are due in order "to make whole the aggrieved employee(s)." The parties agree that the position filled by Robert Lawrence continued in existence beyond the expiration of the collective bargaining agreement and that any amounts due cease as of the termination of the agreement.

3. The collective bargaining agreement provided in Section 1.01 that "[i]t shall continue in effect from year to year thereafter, from June 1 to May 31 of each year, unless . . . terminated in the way later provided herein." Joint Ex. 15. Specifically, "[e]ither party desiring to . . . terminate this agreement must notify the other in writing, at least 90 days prior to the anniversary date." Id., Section 1.02(a).

4. The employer provided notice that it was withdrawing from NECA, but did not provide written notice that it was withdrawing from or terminating the collective bargaining agreement.

5. As a result of the failure to provide written notice, the collective bargaining agreement automatically renewed for one year, unless the union waived that provision by acquiescence and by bargaining for a new contract.

6. The union did waive that provision by bargaining with the employer beginning on August 13 and continuing until October 30. I reach this conclusion as a factual finding based upon the testimony I heard. Alternatively, the union is collaterally estopped from denying this waiver because this issue was fully litigated and resolved before the National Labor Relations Board in its April 12, 1994, Decision and Direction of Election. See Joint Ex. 24.

7. Initially, the employer and union had a so-called 8(f) relationship (referring to a section of the National Labor Relations Act dealing specifically with the construction industry, 29 U.S.C. § 158(f)). The union argues that a 9(a) relationship was created in 1990, see 29 U.S.C. § 159(a), when the union business agent got the employer's signature on a voluntary recognition agreement. I find, however, that the union never showed the employer signed authorization cards demonstrating majority status and never explained the true significance of the new form, but rather explained it only as a clerical need of the International. Indeed, neither the union business manager who got the form signed nor the employer who signed it understood its purpose at the time. This is an insufficient showing to convert an 8(f) relationship to a 9(a) relationship. See Pierson Electric, Inc., 307 NLRB 1494 (1992) (requiring clear intent of the parties to establish a 9(a) relationship based on union's majority status); J & R Tile, Inc., 291 NLRB 1034 (1988) (requiring positive evidence "that the union unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such"); Brannan Sand & Gravel Co., 289 NLRB

977 (1988) (party asserting 9(a) status has burden of proving it is based on affirmative showing of majority support); American Thoro-Clean, Ltd., 283 NLRB 1107 (1987) (same).

8. Because it was not a 9(a) employer, the employer had no duty to comply with the terms of the collective bargaining agreement after the waiver that I have found began on August 13.

9. The amount of wages earned by the improperly hired employee from May 11 to May 31, 1992, is $1,329.90 (97.5 hours at $13.64 per hour). He worked 329.5 additional hours straight time until August 13, plus 3 hours overtime, for an additional $4,555.76 (calculated at the contract rate of $13.64 per hour). Fringe benefits for the period after May 31 are $1,509.68 at $4.52 per hour. Fringe benefits for May are $440.70. I award fringe benefits for the period during May, even though the employer paid contributions to the union funds for that period for Lawrence, because the union is entitled to contributions for both men -- the one who did work and the one who should have worked. The total of all these sums is $7,826.04. (I thought I had ordered the lawyers simply to provide me with calculations based upon undisputed facts. To the extent that the exchange of letters of August 20, 1996, reflects disagreement about underlying facts that the parties believe warrants a further evidentiary hearing, they must notify the Clerk's office by August 30, 1996. See Lussier v. Runyon, 50 F.3d 1103, 1113-15 (1st Cir.), cert. denied, 116 S.Ct. 69 (1995).)

10. The employee who would have been referred by the union was Maurice Cote.

11. There is no evidence of Mr. Cote's earnings or unemployment compensation. The burden of proof for such an offset or failure to mitigate lies with the defendant employer, and there will therefore be no offset.

12. Contrary to the employer's contention, I find that the employer would not have been permitted to reject everyone on the referral list until its favored choice, Number 67, was reached.

13. Contrary to the employer's contention, I find that it did not have a special skill requirement that would fit Section 4.15 of the collective bargaining agreement. Specifically, I accept

the testimony of the union business manager that the special skill requirements were limited to nuclear power, welding skills and foremen. Although arguably the improperly hired employee was to be engaged as a foreman, that argument was never made until trial despite the numerous opportunities to raise it earlier. In particular, it was never raised at the arbitration, the appropriate place to have made this contention concerning interpretation of the collective bargaining agreement in connection with whether there was any grievance that caused any damage. I also infer from the employer's principal's testimony that he had directed the new hire to get the union business manager's consent that the employer's understanding was that he was not entitled to hire him under the collective bargaining agreement.

14. I reject the employer's estoppel argument. It is perfectly apparent on this record that Mr. McBreairty and Mr. Mailman were personally antagonistic before, during and after these incidents, but lack of cooperation existed on both sides and there was abundant opportunity in discovery to determine any necessary facts or contentions.

Accordingly, unless a filing is made by one of the parties under ¶ 9 of this Order by August 30, 1996, judgment shall be entered for the plaintiff in the amount of $7,836.04. In light of the union's delay until the day of trial in naming the substitute employee by which damages could be measured, I deny costs and attorneys fees.

SO ORDERED.

Dated this 23d day of August, 1996.

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D. Brock Hornby
United States District Judge